

1 HONORABLE ROBERT S. LASNIK  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

11 BRUCE KEITHLY, DONOVAN LEE,  
12 and EDITH ANNA CRAMER,  
13 Individually and on Behalf of all Other  
14 Similarly Situated,

Plaintiffs,

15 vs.

16 INTELIOUS, INC., A Delaware  
17 Corporation; and INTELIOUS SALES,  
18 LLC, A Nevada Limited Liability  
19 Company,

Defendants.

Case No. C09-1485-RSL

DEFENDANTS' REPLY IN SUPPORT  
OF ITS REQUEST FOR JUDICIAL  
NOTICE

NOTED FOR:  
**MONDAY, MARCH 8, 2010**  
**(ORAL ARGUMENT REQUESTED)**

20 Plaintiffs allege that “[t]hrough misleading ‘sign-up’ messages on Intelius websites”  
21 consumers:

22 unknowingly enroll[] in a subscription-based service with Adaptive Marketing,  
23 LLC. The details and/or benefits of those Adaptive subscription services  
24 generally are never made known to the consumer, yet the consumer is then billed  
25 a significant monthly fee – often \$19.95/month – in perpetuity. (Cmplt. ¶ 1.)

DEFENDANTS' REPLY IN SUPPORT OF ITS  
REQUEST FOR JUDICIAL NOTICE - 1

Cause No.: C09-1485-RSL

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1       In support of its motion to dismiss, Intelius submitted authenticated full color printouts  
 2 of the offer webpages subject of the Plaintiffs' Complaint. Plaintiffs Lee/Cramer enrolled for a  
 3 Family Safety Report subscription. Cmplt. ¶ 8; Declaration of Ronald V. Thunen III ("Thunen  
 4 Decl."), Ex. A. Plaintiff Keithly subscribed to Intelius' Identity Protect product, which, as  
 5 evidenced by the enrollment forms and discussed fully in Intelius' motion to dismiss, is not an  
 6 Adaptive program and is not a post-transaction offer. Thunen Decl., Ex. B; Motion at 13-14.

7       Plaintiffs' essential claim is that they unwittingly enrolled in these programs:

8       Intelius thus enrolls Plaintiffs and the Class Members into Adaptive Programs  
 9 without adequately disclosing, among other things: (1) that the consumers are  
 10 being enrolled in the Adaptive Programs without their authorization or consent;  
 11 (2) the amount of the recurring charges by Adaptive and/or Intelius; (3) the terms  
 and conditions involved in the Adaptive Programs; and (4) the manner by which  
 the consumer may cancel those services. (Cmplt. ¶ 19.)

12       *See also* Cmplt. ¶¶ 1 (quoted above), 2 ("without full or adequate disclosure"), 16 ("the  
 13 language on the Intelius website has the tendency to mislead customers into unknowingly sign  
 14 up for these Adaptive Programs"), 18 ("the language contained on the Intelius websites has the  
 15 capacity to deceive a substantial portion of the public to initially purchase Adaptive  
 16 products..."); 27A ("... Defendants misstated, omitted, or concealed material facts concerning  
 17 the Adaptive Programs...").

18       Although Plaintiffs' allegations inherently challenge the language and format of the  
 19 website, Plaintiffs did not attach copies of the webpages to their Complaint or opposition brief.  
 20 Plaintiffs now ask the Court not to consider the webpages at all. *See* Plaintiffs' Opposition to  
 21 Request for Judicial Notice at 5. Plaintiffs do not dispute that the webpages with their  
 22 disclosures are those that allegedly deceived Lee/Cramer and Mr. Keithly. In fact, Plaintiffs'  
 23 opposition labors to demonstrate how the terms of those disclosures – now before the Court –  
 24 have the potential to deceive. Plaintiffs' Opposition to Defendants' Motion to Dismiss  
 25

**DEFENDANTS' REPLY IN SUPPORT OF ITS  
REQUEST FOR JUDICIAL NOTICE - 2**

Cause No.: C09-1485-RSL

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1 (hereafter “Opp.”), 10-18.

2 A court ruling on a Rule 12(b)(6) motion to dismiss may consider evidence on which  
 3 the complaint necessarily relies. Since the offers at issue were made *via* the webpage  
 4 disclosures (Cmplt. ¶¶ 1, 2, 16, 18), and since the essence of each claim is that the webpages  
 5 are deceptive, Plaintiffs’ claims do not simply “rely” on the webpages, they cannot exist  
 6 without them. The allegations of deception are entirely dependent upon the content of the  
 7 webpages. Under the circumstances, Plaintiffs’ strenuous efforts to avoid the Court’s  
 8 evaluation of the foundation on which their claims are built, and the only point of reference  
 9 against which the validity of their claims can be tested, is telling.

10 Where the complaint refers to a document, the document is central to the plaintiff’s  
 11 claim, and no party questions the authenticity of the copy attached to the Rule 12(b)(6) motion,  
 12 the Court may consider the document as “incorporated by reference” in the complaint. *Smale*  
 13 v. *Celco Partnership*, 547 F.Supp.2d 1181, 1184 (W.D. Wash. 2008) (citing *Marder v. Lopez*,  
 14 450 F.3d 445, 448 (9<sup>th</sup> Cir. 2006)). The Court may also rely on facts subject to judicial notice.  
 15 *United States v. Ritchie*, 342 F.3d 903, 903 (2003).

16 Plaintiffs cannot dispute that their Complaint relies on the content of the webpages and  
 17 they do not contend that Intelius has asked that the Court take notice of the wrong webpages.  
 18 These are the pages that contain the offers at issue in this case. Plaintiffs advance other  
 19 arguments.

20 First, Plaintiffs state that Intelius has submitted black-and-white copies of the webpages  
 21 that “do not show how certain material was prominent and the fine print was minimized.”  
 22 Opp. at fn 8. *See also* Opp. at 6; Opposition to Request for Judicial Notice at 2. The webpages  
 23 are in color, as the Court’s online docket at PACER shows. *See* Docket No. 21. Second,  
 24 Plaintiffs assert that Mr. Thunen’s initial declaration did not adequately authenticate the  
 25

DEFENDANTS’ REPLY IN SUPPORT OF ITS  
 REQUEST FOR JUDICIAL NOTICE - 3

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1 documents. Intelius respectfully disagrees, but files herewith a supplemental declaration re-  
 2 submitting Exhibits A – C and re-confirming their authenticity. *See Supplemental Declaration*  
 3 of Ronald V. Thunen III (“Supp. Thunen Decl.”).

4 In the normal course of its business, Intelius maintains records relating to the time period  
 5 during which Adaptive offers (including the Adaptive enrollment form attached as Exhibit A to  
 6 the two Thunen Declarations), were active on Intelius’ websites. Supp. Thunen Decl., ¶ 6. The  
 7 Adaptive offer attached as Exhibit A was active in June 2008 and Intelius’ records of  
 8 Lee/Cramer’s June 2008 transaction show that Lee/Cramer were presented with the enrollment  
 9 form attached as Exhibit A. *Id.*

10 The Intelius in-cart IDP offer presented to Mr. Keithly (attached as Exhibit B to the  
 11 Thunen Declarations) was regenerated by rolling back Intelius’ website software code to April  
 12 7, 2009, the date of Mr. Keithly’s transaction, using data archived on back-up tapes and on  
 13 Intelius’ servers. *See* Supp. Thunen Decl., ¶¶ 9-13 (describing the process).

14 Plaintiffs also contend that the exhibits are incomplete, but the Thunen Decl. exhibits  
 15 are the complete steps by which Lee/Cramer and Mr. Keithly enrolled in their respective  
 16 subscription programs. *See* Supp. Thunen Decl., ¶ 14 (Mr. Keithly arrived at Intelius’ web site  
 17 via a third party web site)<sup>1</sup>; Cmplt. ¶¶ 16-17 (generally describing Adaptive offers, such as that  
 18 accepted by Lee/Cramer, as comprising “a page.”)

19 Plaintiffs also oppose the Court’s evaluation of the printouts of the regenerated web  
 20 pages because they are “static” and because they “are supposed to be webpages that  
 21 approximate the visits made by Plaintiffs several months ago.” Opp. Request for Judicial  
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23 <sup>1</sup> After completing his discounted purchase of a Background Report and a trial Identity Protect subscription, Mr.  
 24 Keithly apparently was shown a third-party advertisement that is not germane to his claim that he was duped into  
 25 signing up for Identity Protect (an Intelius in-cart product that was purchased when, not after, Mr. Keithly  
 purchased another Intelius product—i.e., the “post-transaction” phase of Mr. Keithly’s experience has nothing to  
 do with his signing up for Identity Protect *during* his purchase of a Background Report at a discounted price).

DEFENDANTS’ REPLY IN SUPPORT OF ITS  
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1 Notice at 2.<sup>2</sup> However, courts regularly consider properly authenticated web site printouts,  
 2 including archived webpages (*i.e.* those no longer available on the website).

3 In *Browne, et al., v. Avvo, Inc.*, this District Court considered claims that a website with  
 4 information and comparative ratings of attorneys violated the Washington Consumer  
 5 Protection Act. Defendant, Avvo Inc., submitted archived screen shots in connection with its  
 6 Rule 12(c) motion to dismiss based on failure to state a claim. The Court stated:

7 Although the Court's review is generally limited to the contents of the complaint, Ninth  
 8 Circuit authority allows the Court to consider documents referenced extensively in the  
 9 complaint, documents that form the basis of plaintiffs' claim, and matters of judicial  
 notice when determining whether the allegations of the complaint state a claim upon  
 10 which relief can be granted. *The archived screen shots of pages from Avvo's mid-June*  
*2007 website and the Washington State Bar Association records submitted by the*  
*parties appear to fall within one or more of these categories.* For purposes of this  
 11 motion, therefore, the allegations of the complaint and the documents submitted will be  
 accepted as true and construed in the light most favorable to plaintiffs.

12  
 13 *Browne, et al., v. Avvo, Inc.*, 525 F.Supp.2d 1249, 1250 (W.D. Wash. 2007) (emphasis added)  
 14 (internal citations omitted) (granting motion to dismiss). *See also Mehmet v. Paypal Inc.* 2008  
 15 U.S. Dist. LEXIS 64018 at \* 6 (N.D. Cal. Aug. 12, 2008) (taking judicial notice of Paypal user  
 16 agreement where plaintiff referenced the user agreement and relied on it in support of  
 17 substantive allegations, but did not attach it to his complaint); *Druyan v. Jagger*, 508 F. Supp.  
 18 2d 228, 236 (S.D. N.Y. 2007) (considering Ticketmaster website content where plaintiff  
 19 alleged to have viewed and relied on the information to her detriment).

20 Plaintiffs neither dispute that Thunen Decl. Exhibits A and B comprise the offers that  
 21 were presented to them in June 2008 and April 2009, respectively, nor provide the Court with  
 22

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23 <sup>2</sup> At footnote 8 in their Opposition to Intelius' Motion to Dismiss, Plaintiffs state that they "have had no  
 24 opportunity to confirm-through discovery- that the screen shots proffered by Intelius were viewed by Plaintiffs on  
 the days of their Intelius transactions." But Plaintiffs do not explain how they can sustain their claim without  
 25 alleging any underlying facts to support their conclusory allegations, nor do they contend that the Thunen exhibits  
 are not in fact the offers.

1 any basis for questioning the authenticity of the proffered web page printouts. Intelius  
2 respectfully requests that the Court consider the web pages in connection with Intelius' motion  
3 to dismiss.

4 DATED this 8<sup>th</sup> day of March, 2010.

5 DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

6 By \_\_\_\_\_  
7

8 Arthur W. Hartigan, Jr., WSBA #1751  
9 Tyler Farmer, WSBA #39912  
10 Attorneys for Defendants Intelius Inc.  
11 and Intelius Sales, LLC



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DEFENDANTS' REPLY IN SUPPORT OF ITS  
REQUEST FOR JUDICIAL NOTICE - 6

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 8<sup>th</sup> day of March, 2010, I served a true and correct copy of the foregoing DEFENDANTS' REPLY IN SUPPORT OF ITS REQUEST FOR JUDICIAL NOTICE on the following individuals:

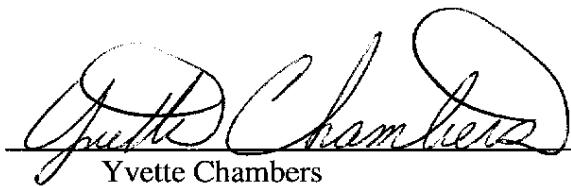
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Yvette Chambers

DEFENDANTS' REPLY IN SUPPORT OF ITS  
 REQUEST FOR JUDICIAL NOTICE - 7

Cause No.: C09-1485-RSL

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